SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

October Term, 1957.

LUTHER THOMAS LAMBERT, Et Al., - - - - Appellants,

versus

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Et Al., - - Appellees.

No. 519.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

MOTION OF APPELLEE, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, TO DISMISS OR AFFIRM

AND

BRIEF IN SUPPORT OF THE MOTION.

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UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, ET AL., - - *Appellees*.

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MOTION OF APPELLEE, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, TO DISMISS OR AFFIRM

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I.

THE MOTION.

Louisville and Nashville Railroad Company, appellee in the above-entitled case,[1] pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United

[1]Intervening defendant below, as of right, under 62 Stat. 970 (1948), as amended, 63 Stat. 105 (1949); 28 U. S. C. §2323. Appellee received appellants' Jurisdictional Statement on September 24, 1957.

States, moves to dismiss the appeal because it has not been taken in conformity with the Rules of this Court or, in the alternative, that the final judgment and decree of the District Court be affirmed on the ground that the questions presented are so unsubstantial as not to need further argument.

In support of this motion this appellee respectfully presents the following:

II.

BRIEF IN SUPPORT OF THE MOTION.

Opening Statement.

The appeal here is from the same decision of the three-judge, specially-constituted district court (for the Middle District of Tennessee, Nashville Division) as the appeal in *City of Nashville, Tennessee, et al. v. United States and Interstate Commerce Commission, et al.*, No. 365, to be referred to hereinafter as the *Nashville* case.

The appeal should be dismissed because the case was not docketed, as required by Rule 13 of this Court's rules, within sixty days after the filing of the notice of appeal. The notice of appeal bears the stamp of the Clerk of the district court "Filed Jul 26 1957 John O. Anderson, Clerk By R. D. Hall D.C." The case was docketed in this Court on September 30, 1957, or more than sixty days after the filing of notice of appeal, in violation of Rule 13. The jurisdictional statement is also in violation of other rules of this Court, as will hereinafter be shown.

While this, we believe, should be enough to dispose of the appeal, we proceed to show that; in any event, no substantial question has been presented by appellants.

By footnote 2 at page 4 of their Jurisdictional Statement they state that in their notice of appeal they requested "that the two appeals [this one and that taken in the *Nashville* case] be consolidated, or heard by the Court at the same time." And thereafter: "Appellants herein adopt and rely on the questions presented as set forth in the jurisdictional statement of the City of Nashville, *et al.*, in addition to those set forth herein." In the brief of appellee Louisville and Nashville Railroad Company on its motion to affirm the decision of the lower court on that appeal, we have been at pains to show this Court that although many questions were therein presented, not one of them is at all substantial. We will not repeat here the showing there made but refer to it as though it were a part of this brief, particularly insofar as appellants herein adopt and rely on the questions raised by that appeal.

The fact is that the questions separately stated by appellants here are by no means entirely separate questions from those raised in the *Nashville* appeal, as will hereinafter appear.

Two observations with respect to appellants' statement of the case seem appropriate before discussing the questions they ask the Court to pass upon.

The first is that the presumption indulged, that the lower court "felt that the [Interstate Commerce] Commission's order, as issued, did not comply with the

statute" (p. 7), because it expressed its approval of the order as being upon the condition that N. C. & St. L. employees should be protected equally with L. & N. employees under the Commission's decision, is entirely unwarranted. This may clearly be seen in the court's unequivocal conclusion:

> "Neither the plaintiff nor any of the intervening plaintiffs has shown any ground upon which the court could justify an order annulling, vacating, or setting aside the order of the Commission." (p. 13, typewritten copy of decision.)

As we showed with particularity in our brief on our motion to affirm in the *Nashville* case (pp. 44-49), the court clearly was not, in the language to which appellants here refer, finding any fault with, or undertaking to revise or amend, the Commission's order, but was undertaking merely to make clear and certain that the court's interpretation was that such order did not direct or authorize any discrimination against N. C & St. L. employees and that it was with that understanding or interpretation that the Commission's order was approved.

Secondly, the appellants' statement (p. 7) that the "uncontradicted testimony of applicants' witnesses . . . that *all* dismissals and transfers would come from"[1] N. C. & St. L. employees is not only not supported in the brief by any reference to the record but is not supported by the record nor by the Commission's decision, as we shall hereinafter demonstrate.

Statutes referred to herein are reproduced in the Appendix.

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[1] Italics theirs.

Summary of Argument.

The questions presented by this appeal overlap those presented in the appeal of the City of Nashville, *et al.*, in No. 365, October Term, 1957, in which this appellee has filed a motion to affirm.

The Interstate Commerce Commission fully and completely satisfied the requirements of Section 5(2)(c) and 5(2)(f) of the Interstate Commerce Act relating to the effect on employees of a railroad merger, in its report and order in *Louisville & Nashville Railroad Company, et al. Merger etc.*, 295 I. C. C. 457, which are here assailed.

The weight to be accorded the considerations specified in Section 5(2)(c) of the Interstate Commerce Act is for the Commission, not the courts.

The Commission must be guided, in a railroad merger case, by the over-all Congressional policy of development and maintenance of an economical, efficient and adequate railroad system as a matter of primary national concern.

The lower court did not undertake to alter or revise the Commission's order here assailed but only to interpret it, and, as interpreted, the court approved it.

Appellants raise several questions not properly before this Court because not seasonably raised.

No substantial question is presented by appellants.

Appellants' Question 1 Presents No Substantial Question.

Question 1 as stated by appellants (pp. 4, 8) is in two parts. The first part is whether the Commission may, in a railroad merger case under Section 5 of the Interstate Commerce Act,[1] lawfully ignore the interest of affected employees or fail to give proper weight to such interest.

The question is not substantial because, first of all, this is not a case where the Commission ignored the interest of affected employees. To the contrary, the most sympathetic and serious consideration was accorded this aspect of the case by the Commission. This will at once clearly be seen by even a casual examination of the Commission's report. *Louisville & Nashville Railroad Company, et al. Merger etc.*, 295 I. C. C. 457, at pp. 500-503 and 505-506.

In the second place, the weight to be accorded such a consideration is necessarily for the Commission. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 68 (1944); *B. & O. R. Co.* v. *United States*, 298 U. S. 349, 358-360 (1936); *St. Louis & O'Fallon R. Co.* v. *United States*, 279 U. S. 461, 487 (1929); *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 36 F. 2d 789, 801 (W. D., Mo., 1929), affirmed 282 U. S. 74 (1930); *Virginia Stage Lines* v. *United States*, 48 F. Supp. 79, 82-83 (W. D., Va., 1942).

Appellants, however, preface and qualify this question in such a way as to suggest that "under the guise

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[1] 24 Stat. 380 (1887), as amended, 54 Stat. 905 (1940), 63 Stat. 485 (1949); 49 U. S. C. §5.

of imposing what are alleged to be (but in actuality are not) liberal protective conditions" (pp. 4, 8) the Commission proceeded unlawfully in dealing with the interest of affected employees. The reference to "alleged to be . . . liberal" is to the following finding of the Commission:

> "It is generally conceded that the conditions recommended by the examiner, and which we hereby adopt, are more favorable than any heretofore imposed in merger cases. . . ." (295 I. C. C. at p. 502.)

The nature of such conditions is described at pages 42 and 43 of our brief in support of our motion to affirm in the *Nashville* case. There was, as there appears, and as appears more particularly at pages 500-503 of the Commission's report, no ignoring or failure to accord weight to the interest of affected employees under any guise or in any manner.

The parenthetical charge that the protective conditions imposed by the Commission are not in fact liberal is unsupported anywhere in appellants' jurisdictional statement and is unsupportable. As the Commission stated, they are the most liberal conditions ever prescribed in such a case.

The second part of appellants' Question 1 is whether the Commission may give "primary consideration to the factor involving service and a lesser or secondary consideration to the interest of the employees" where the Commission makes a finding "that there will be no immediate and direct improvement in the service to the public" (pp. 4, 8).

This part of the question, like the first part, proceeds from erroneous assumptions both as to the law and the facts.

Appellants say here, in substance, that there are four considerations enumerated in Section 5(2)(c) of the Interstate Commerce Act[1] to be weighed in a railroad merger case; that only two of them are at issue here, one relating to "service" and the other to the "interest of the employees"; that in such circumstances it is for the Commission to weigh the service gains or advantages to the public against the disadvantages to the employees; that this is the way the Commission has always proceeded in such cases as this one; and that here, since the Commission found that "it does not appear that applicants contemplate that any immediate and direct improvements in service will result from the merger," and since it found that there is an "admitted adverse effect" upon employees, the latter consideration outweighs the former and therefore approval of the transaction should have been withheld (pp. 8-18).

The first and principal error here is in the manifest misconception of the meaning of Section 5(2)(c), which reads:

> "(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon

[1] 54 Stat. 906 (1940); 49 U. S. C. §5(2)(c).

> the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

The statute does not confine the Commission's consideration to the four factors specified, or to any two of them, nor can it properly be read as saying that the Commission's function in such a case as this one is simply to weigh prospective service improvements against the effect of the transaction on employees. Appellants not only disregard the fact that the Commission dealt with all four considerations specified in the statute[1] but completely ignore the statutory words "among others," which follow the words "the Commission shall give weight to the following considerations."

This Court explained in *Schwabacher* v. *United States*, 334 U. S. 182, 193 (1948):

> ". . . The Act does not specify every consideration to which the Commission must give weight in determining whether or not any plan meets the tests. Section 5(2) provides only that, 'among others,' the Commission shall consider the effect upon adequate transportation service, the effect of inclusion or failure to include other railroads, total fixed charges, and the interests of the carrier employees affected. . . ."

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[1] 295 I. C. C. 457, at pp. 502-505.

The Commission weighed many considerations in its determination of the application in this case. Among these were the large economies and improved efficiency which could be effected by the merger,[1] the fact that the two involved railroads were exceptionally well adapted to integration and unified operations,[2] the fact that in studies of the Commission made pursuant to Transportation Act, 1920, the two railroads were treated together "as though any consolidation plans involving the 2 railroads would necessarily bring them together,"[3] the fact that in World War I the Federal Government operated them under a single Federal Manager,[4] the fact that the L. & N. owned approximately 75% of the capital stock of the N. C. & St. L. and had controlled it for more than 75 years,[5] the fact that railroads generally are today extremely hard-pressed by governmentally-subsidized competition by airway, highway and waterway and that in such a situation it is "imperative" for them "to do everything in their power to enhance their competitive situation,"[6] the fact that interested shippers throughout the involved territory supported the merger,[7] and the fact that two interested railroads supported it and no railroad or other form of transportation opposed it.[7]

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[1] *Id.*, pp. 477, 488-493, 504-505.
[2] *Id.*, p. 477.
[3] *Id.*, p. 478.
[4] *Id.*, p. 461.
[5] *Id.*, pp. 467-468, 474-476.
[6] *Id.*, pp. 479-480.
[7] *Id.*, pp. 480-481, 488.

These and other pertinent considerations are more fully presented at pages 35-49 of our brief in support of our motion to affirm in the *Nashville* case.

As is there shown, this Court has plainly pointed out, in *McLean Trucking Co.* v. *United States, supra:*

> ". . . Resolving these considerations [those involved in a merger case] is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation [motor carriers], but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' [citing cases]" (321 U. S. at pp. 87-88)

Immediately following the language we have quoted hereinbefore from the *Schwabacher* case, this Court added with respect to the broad purposes of the Interstate Commerce Act in the light of which all sections of it must be read:

> ". . . This Court has recently and unanimously said in reference to this Act, 'Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind.' *Seaboard Air Line R. Co.* v. *Daniel,* 333 U. S. 118." (334 U. S. at pp. 193-194)

The over-all purpose of Section 5(2) of the Interstate Commerce Act was pointedly explained by this Court in *United States* v. *Lowden*, 308 U. S. 225, 232 (1939), as follows:

> ". . . As a result of the enactment of the Transportation Act in 1920, consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy . . . The policy of consolidation is so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other."

While this was written in 1939 and Section 5(2) of the Interstate Commerce Act was amended in 1940, the change made in that section in 1940 was merely, as this Court subsequently explained in its decision in the *Schwabacher* case, to substitute "voluntary plans of merger or consolidation" for a nationwide plan of consolidations charted by the Commission under a directive of the Congress (334 U. S. at p. 193).

The next misstep of appellants is in construing too narrowly the statutory words, "[t]he effect of the proposed transaction upon adequate transportation service." They interpret this language as meaning [that the Commission shall consider] whether there will be any immediate and direct improvement in service as a result of the involved transaction, and they regard the Commission's finding that "it does not appear that the applicants contemplate that any immediate and direct improvement in service will result from the merger" as putting an end to that consideration.

They do not seem to recognize as being within the scope of these statutory words the following finding of the Commission made immediately after the finding quoted and relied on by them:

> ". . . Nevertheless, it is our view that the accompanying savings and improved efficiency of operation necessarily would strengthen the applicants and render them capable of better service. This we find should, in the long run, result in improvement of the service which they otherwise would be able to render. . . ." (295 I. C. C. at p. 504)

Or the following, immediately thereafter:

> ". . . Applicants have spent vast sums of money in improvements to their equipment and plant. Additional improvements are planned for the future, particularly with respect to expanded yard facilities at Atlanta, Birmingham, and Louisville. Nothing now left to be done offers such great opportunity for improvement in efficiency and economy as does the proposed merger. Applicants can see and identify aggregate savings of more than $3 million per year, with other possible savings, some suggested in the record, and others perhaps not yet envisoned. . . ." (p. 504)

Or the following:

> "Combining the facilities and resources of the Kentucky company and the Tennessee company under one management would give better control of mounting operating costs and enable the surviving company to meet more effectively competition from other modes of transportation. The

anticipated accomplishments from the merger would give assurance of a stronger and financially more stable railroad.

"Single ownership and control of the properties will tend toward a more economical and efficient operation which, in turn, will inure to the benefit of the shipping public: Compare *Bessemer & L. E. R. Co. Merger,* 275 I. C. C. 167, 179. It will also, in this case, result in desirable corporate simplification, will reduce accounting work with its attendant expenses, and will materially reduce the number of reports which must now be filed individually by the applicants with regulatory commissions and other public authorities." (pp. 504-505)

Ignored entirely by the appellants is the following finding:

". . . On the whole, we conclude that the merger would enhance the adequacy of service by the merged companies, and would constitute the best use of the facilities." (p. 504)

Appellants furthermore fail to recognize that in the finding they cite and rely upon, the Commission was necessarily employing the term "service" in a narrow sense, as referring to such things as expedition and frequency of train movements, because it elsewhere found that other advantages to shippers, properly to be called service advantages in a broader sense, would immediately accrue. This is shown at pages 18-21 of our brief in support of our motion to affirm in the *Nashville* case.[1]

[1]Please see also the quotations from the Commission's report cited at page 75 of that brief.

In asserting that the Commission did not in this case weigh the interests of the affected employees against the advantages to the public from the proposed merger; appellants not only overlooked or disregarded the Commission's aforementioned sympathetic treatment of the subject of the effect of the transaction on employees (295 I. C. C. at pp. 500-502 and 505-506) but particularly the Commission's conclusion that "the application herein should not be denied because some employees will be adversely affected in the event the merger is consummated" (p. 501).

Appellants' assertion (p. 12) that [since the decision of the Commission in *Fort Worth & D. C. Ry. Co. Lease,* 247 I. C. C. 119 (1941)], "the Commission has consistently held . . . that Section 5(2)(c) requires it to *weigh*[1] the gains or advantages to the public in point of service with the disadvantages to the carrier employees affected" (by which we understand appellants to mean the weighing of the one against the other) can not be supported by authority and the cases cited by appellants do not support it.

Only one decision (*Oklahoma Ry. Co. Trustees Abandonment,* 257 I. C. C. 177 (1944)) is quoted from, and we reproduce as follows the Commission's statement from which that quotation is lifted:

> "Section 5(2)(c) specifies certain considerations to which, among others, we shall give weight . . . Among other considerations is 'the interest of the carrier employees affected.' In passing upon these applications, therefore, we have given weight to that *as well as other considerations,* and

[1] Italics theirs.

> have reached the conclusion that under the circumstances shown, and with the conditions here imposed, the possible disadvantages to the employees do not outweigh the advantages to the public resulting from carrying out the proposed plan." (p. 195; italics ours.)

The full statement thus clearly reveals that it does not support appellants' proposition, nor is there anything in the other cases cited to support it. In one of them, *Marion Trucking Co., Inc.—Purchase—Harwood Trucking*, 50 M. C. C. 613 (1948), the following appears:

> ". . . The interest of the carrier employees affected is *only one of many elements to which weight must be given* in considering whether a proposed transaction is consistent with the public interest. . . ." (p. 632; italics ours)

As to the *Fort Worth* case, put forward by appellants as an outstanding authority, we have shown, at pages 35-42 of our brief on our motion to affirm in the *Nashville* case, that that case was quite unlike this one, but apart from that fact that the decision therein is not a reliable authority, never having been followed or cited as an authority, so far as we have been able to find, in any subsequent case.

Appellants are misleading in saying further (p. 14) that the Commission and the district court presumably accepted the theory of appellees that "[i]f the employees receive the protection contemplated by Section

5(2)(f),[1] their interest in the proceeding is at an end." The quoted statement is from appellee's brief in the district court but is lifted out of context—it being from a discussion of the question whether appellants could show irreparable damage. Appellants here use it to indicate that appellee took the position that the Commission should only consider Section 5(2)(f) and need not consider Section 5(2)(c) insofar as the effect of the merger on employees is concerned. Appellee took no such position in that brief (and has never taken any such position) but to the contrary there took the position that:

> "Section 5(2)(c) of the Interstate Commerce Act provides merely that in passing upon a proposed transaction such as a rail merger, the Commission shall 'give weight' to four considerations, 'among others,' one of those four considerations being the interest of the carrier employees af-

[1]Reading:

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

fected. . . ." (p. 127 of appellee's brief in the district court)

The position was taken further (p. 132) that the Commission had considered both Section 5(2)(c) and Section 5(2)(f) in reaching its determinations. Such also is the position we have taken before this Court in our brief on our motion to affirm in the *Nashville* case, as may be seen at pages 41-42 of that brief.

Finally, in their presentation under Question 1, appellants concede (p. 16) that the Commission dealt with Section 5(2)(c) [as well as Section 5(2)(f)] and the considerations enumerated therein, and declared with respect thereto that "[t]he foregoing are the primary elements affecting the public interest with which the transaction must be consistent" (295 I. C. C. at page 503), but complain of the fact that immediately prior to this quoted statement, and subsequent to its statement of the requirements of Section 5(2)(c), it made the following statement:

> ". . . In administering these provisions we are to be guided primarily by consideration for adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25. . . ." (295 I. C. C. at pp. 502-503)

Appellants say this statement is erroneous and operates improperly to subordinate the interest of the employees. But that is not so. The language, moreover,

is taken almost verbatim from a decision of this Court. Appellants say it comes from the decision in *New York Central Securities Corp.* v. *United States,* 287 U. S. 12 (1932), and that that decision was rendered prior to the time of the 1940 amendments to Section 5 of the Act. That is true, but is of no significance.

The language assailed is very close to the language of the national transportation policy, written into the law in 1940, which calls upon the Commission "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers" and concludes:

> ". . . all to the end of developing, coordinating, and preserving a national transportation system . . . adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Furthermore, this Court, in the *McLean* case, decided in 1944, used almost the same language as the Commission's language here assailed, it being there said by this Court (321 U. S. 67, 81):

> ". . . the Commission was to be guided primarily by consideration for 'adequacy of transportation service, . . . its essential conditions of economy and efficiency, and . . . appropriate provision and best use of transportation facilities. . . .' *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 25."

Furthermore, in the *Schwabacher* case, as we have seen, this Court said, in 1948, after referring to the contents of Section 5(2)(c):

> ". . . This Court has recently and unanimously said in reference to this Act, 'Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind.' *Seaboard Air Line R. Co.* v. *Daniel*, 333 U. S. 118." (334 U. S. 182, 193-194)

Appellants' Question 2 Presents No Substantial Question. A Further Question, Relating to Compliance With the Administrative Procedure Act, Not Seasonably Raised by Appellants But Discussed Under the Heading "Question 2," Also Lacks Substantiality Besides Coming Too Late.

Question 2 as stated by appellants (pp. 4, 18) is also in two parts.

The first part is whether the Commission may approve a railroad merger where it does not require a fair and equitable arrangement to protect adversely affected employees as required by Section 5(2)(f). This is really no question at all since Section 5(2)(f) requires a fair and equitable arrangement to protect railroad employees affected, and the Commission in this case fulfilled that requirement. In doing so it said, as we have shown, that the protective arrangement prescribed was more favorable to the affected employees than any ever before prescribed in a merger case (295 I. C. C. at p. 502).

The second part of the question is stated as being whether the district court may lawfully revise or amend an order of the Commission or is limited to sustaining or setting aside such an order or remanding it to the Commission. As we have pointed out earlier herein,[1] and shown more fully in our brief[2] on our motion to affirm in the *Nashville* case, the district court did not undertake to revise or amend, in any way, the Commission's order but merely interpreted that order and approved it as so interpreted.

It is amazing that appellants should advance a contention to the contrary, for they unequivocally asserted before the district court:

> ". . . We submit that the Court, in its opinion, has not altered or revised the order of the Commission, but has simply interpreted it in such a manner as to make it free from ambiguity, which it clearly has the right to do."[3]

This should be sufficient to show the lack of any substance to appellants' Question 2, but there are two other representations of appellants on which comment seems appropriate.

Appellants erroneously represent that the testimony of applicants' witnesses was that all dismissals and transfers would come from employees of the N. C. & St. L. and that this is revealed in the Commis-

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[1] *Supra*, pp. 3, 4.

[2] At pp. 44-49 of that brief.

[3] In their "Reply to Memorandum on Behalf of the United States and the Interstate Commerce Commission with Respect to the Form of Judgment and the Plaintiff's Application for a Stay Pending Appeal," p. 1.

sion's report. The showing of applicants related to *jobs*, not to persons, that with the merger would no longer be needed. This may be seen in the testimony of the principal witness for the applicants, witness Tilford, President of the Louisville and Nashville Railroad Company. For example:

> "Q. Are substantial savings promised through elimination of jobs?
>
> A. Yes, but the elimination of jobs will be relatively small and much less than has been effected through reductions of forces by the involved roads in recent years, as shown on Sheet 6 of my exhibit. Approximately 550 *jobs* will be abolished within a year of the approval of the merger." (Tr. 33;[1] italics ours.)

The following is from the cross-examination of the witness by counsel for appellants:

> "Q. The employees that would be eliminated at Nashville would, of course, be the employees who had the least seniority with your company at Nashville?
>
> A. I am not sure. I can't tell about that. What will happen in seniority will depend on negotiations with the union. We would be willing to give them whatever seniority they have earned on the N. C. & St. L., but that would be [subject to] agreement with the Brotherhoods, as I see it" (Tr. 137).[2]

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[1]This reference and all such references hereafter are to the transcript of testimony before the Commission.

[2]Please see also Tr. 138, 263, 378, 384, 387, 539, 1420.

Upon the request of the attorney for the labor unions (Tr. 434-435), the applicants supplied for the record a detailed showing (in Exhibit H-59) of all personnel changes contemplated as a result of the merger, the showing being of *jobs* that would not be needed, not of *persons* to be affected. Thus the Commission found that 550 "jobs" held by employees of the N. C. & St. L. would be abolished and that 289 jobs would be transferred (295 I. C. C. at p. 500), not that the adversely affected persons would all be N. C. & St. L. employees. Indeed appellants themselves have recognized and stated that "the Commission's order does not *require* all dismissals to come from employees of the N. C. & St. L. Railway . . ."[1] (Emphasis theirs.)

Appellants allude to what transpired before the district court on the subject, but the reference is most inadequate. We believe our discussion of the subject at pages 44-49 of our brief in support of our motion to affirm in the *Nashville* case discloses precisely what took place on the subject in the lower court and the underlying basis for the statement of the lower court that is here assailed.

Finally, under the heading of Question 2, an attack is made (a) on the Commission's decision because it did not contain findings that the adverse effect on employees affected by the merger would be "permanent" and (b) on the district court for having concluded that the Commission was not required to make such a finding (p. 22).

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[1]Appellants' "Motion for Stay" addressed to Mr. Justice Brennan, p. 5.

The question thus presented was not listed in appellants' notice of appeal nor included in their statement of questions presented on appeal (pp. 4, 5) nor is it fairly comprised within the questions so listed. Rule 10, Par. 2(c), of the Rules of this Court provides that "[o]nly the questions set forth in the notice of appeal or fairly comprised therein will be considered by the court" and Rule 15, Par. 1(c)(2), thereof, provides that the "jurisdictional statement may not raise additional questions or change the substance of the questions already presented." The Court has condemningly referred to such a practice as appellants here employ as "the practice of smuggling additional questions into a case." *Irvine* v. *California*, 347 U. S. 128, 129 (1954). But aside from this, the question presented is a frivolous one.

How could the Commission, or anyone, have made a finding that the adverse effect on those affected by the merger would be "permanent"? Some of those affected would be persons transferred from one locality to another. To the extent these are N. C. & St. L. employees (and appellants refer to no others), they would be going into the L. & N. organization, a larger and stronger railroad company, where they may very well find opportunities for advancement and job stability which could not have been theirs with the smaller and weaker N. C. & St. L. Railway.

Appellants' argument has ignored this consideration and is restricted to the proposition that because wages of railroad employees in Nashville are on a higher level than wages paid by other firms in that

City, dismissed employees in Nashville, having received four years' protection (as a minimum), *i.e.*, not being any worse off, paywise, for a period of four years, would continue ever thereafter to be adversely affected. That proposition is a plain *non sequitur*. How could the Commission have been expected to find that four years hence the presently existing relation between the compensation of railroad workers and other workers in the Nashville area (assuming that those dismissed in Nashville all remain in that City) would continue to be what it is today? Or how could the Commission have found that those dismissed in Nashville and who would become connected with other businesses there, or who might move to other localities, would be worse off rather than better off? Some of those persons indeed may find employment with the L. & N., for as appears in the Commission's report (295 I. C. C. at p. 503) the L. & N. intends to retain over 2,600 positions at Nashville, and those presently holding those positions will not continue indefinitely to hold them, deaths, retirements and resignations being events which constantly occur. Finally, the assumption that those adversely affected all live in Nashville is utterly baseless.

Question 3 Presents No Substantial Question and Improperly Raises a Question Not Presented to the Lower Court. Appellants Also Improperly Raise Other Questions in Their Presentation Under Question 1, Such Other Questions Not Having Been Set Forth in Their Notice of Appeal and Not Being Comprised in the Questions There Raised.

The final question stated by appellants, *i.e.*, whether the district court may sustain an order of the Commission where it did not have before it, and did not consider, exhibits filed subsequent to the hearings before the Commission, on instructions of the hearing Examiner, is a question which was not presented to the district court and therefore is not properly before this Court. *United States* v. *Atkinson*, 297 U. S. 157, 159 (1936).[1]

Appellants raised a variety of questions in the court below, but no question about the completeness of the record before the Commission, with which Question 3, as stated, is solely concerned. In their effort to show substantiality of their Question 3, appellants proceed to argue other questions: They argue that the Commission "overlooked" certain evidence in disposing of their exceptions, and that the lower court erred in overruling "appellants' allegations to this effect" in its Conclusion of Law No. 7 (pp. 24, 25), and they argue further that the district court did not have before it the entire record made before the Commission (p. 29).

[1]Other authorities on this point are cited at page 50 of our brief on our motion to affirm in the *Nashville* case.

While such questions are not properly before the Court, under Rules 10 and 15 of this Court's rules, to which we have hereinbefore adverted,[1] they are completely without substantiality.

As to the first one, appellants alleged in their complaint that the Commission "ignored and failed to consider"[2] the figures of record on the subject of diesel locomotive repair costs. It should be explained that applicants had shown that effectuation of the merger would produce savings of approximately $3,243,123 per annum.[3] This was not questioned by appellants, or by anyone, but appellants sought to overcome that showing by reliance on statistics which they say showed that the N. C. & St. L. performed diesel locomotive repairs at a lower cost than did the L. & N. Contrary to the allegation of appellants, the lower court found that the Commission did consider their "contention that diesel locomotive repair costs are higher on the Louisville and Nashville than on the Nashville, Chattanooga and St. Louis" and had rejected it.[4] That the court was entirely correct may be seen in the Commission's report, 295 I. C. C. at p. 493.

If there is any doubt about the Commission having considered and passed on the question—we do not see how there can be any doubt about it—it certainly dis-

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[1] *Supra*, p. 24.

[2] Paragraph 7, p. 6, of the complaint.

[3] 295 I. C. C. at pp. 491-492, 493, 504. As was explained in footnote 4 at page 14 of our brief on our motion to affirm in the *Nashville* case, this calculation was based on evidence of minimum savings and on evidence given in 1955, since when there have been increases in wages and price levels which would operate materially to increase the savings then estimated.

[4] Typewritten opinion, p. 12.

appears with the statement of the Commission, after nearly fifty printed pages of thoroughgoing review and treatment of the issues, that exceptions not specifically discussed or reflected in its findings or conclusions have been given consideration and are found to be not justified, 295 I. C. C. at p. 505.

If the record before the Commission submitted to the district court was to any extent incomplete it was due to the failure on the part of appellants, in their attack upon the order of the Commission, to make it complete, and if they failed to do so they cannot be heard to complain of the district court's decision on the ground that the record before it was not all that it might have been. Under the Administrative Procedure Act[1] a reviewing court is called upon in such a case as this one to "review the whole record or such portions thereof as may be cited by any party . . ."[2] A party cannot expect to profit from its own neglect in failing to see that every part of the record it desired to be before the court was before it.

But the record was not incomplete. Appellants themselves, as they admit at page 29 of their jurisdictional statement, filed in open court an amendment to bring to the court's attention the documents which they now complain the court did not consider. The documents having thus been brought to the lower court's attention, it cannot be assumed, as appellants do assume, that the court did not consider them.

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[1] 60 Stat. 237 (1946), as amended, 5 U. S. C. §1001, *et seq.*
[2] *Id.*, §1009(e).

Conclusion.

The case not having been docketed in this Court within the time permitted by the Court's rules, the jurisdictional statement of appellants having otherwise disregarded the Court's rules, in the respects we have herein specified, and it being clear and certain that appellants have submitted no substantial question, it is respectfully submitted that the appellee's motion set forth at the outset herein should be granted.

Respectfully submitted,

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PROOF OF SERVICE.

I, W. L. Grubbs, one of the attorneys for appellee, Louisville and Nashville Railroad Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing motion to dismiss or affirm and brief in support thereof on appellants, and that I have heretofore (on September 6, 1957) served on them motion to affirm and brief in support in the companion case, *City of Nashville, et al.* v. *United States, et al.*, No. 365, cross-references to which appear in the foregoing motion and brief, by mailing copies thereof, in duly-addressed envelopes, with first-class postage prepaid, to their attorneys of record as follows:

Messrs. Walter Harwood and Judson Harwood,
Messrs. Harwood, Breedlove & Mittwede,
Nashville Trust Building,
Nashville 3, Tennessee.

This 15th day of October, 1957.

W. L. Grubbs

APPENDIX

Reproduction of Statutory Provisions Referred To

TITLE 5 U. S. C.

§ 1009. Judicial review of agency action

Scope of Review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

TITLE 28 U. S. C.

§ 2323. Duties of Attorney General; intervenors

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

TITLE 49 U. S. C.

Preceding § 1

"National Transportation Policy"

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantage of each; to promote safe, adequate economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to co-operate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

§ 5. Combinations and consolidations of carriers—Pooling; division of traffic, service, or earnings

Unifications, mergers, and acquisitions of control

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers, jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary

in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.